In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 536

ANDREW CLEVELAND ROGERS, III, AND ANDREW CLEVELAND ROGERS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b),[1] petitioners, a father and his minor

[1] "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

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son, sought damages for injuries sustained by the boy allegedly because of malpractice of government doctors in making a mistaken diagnosis of the boy's illness and providing him with ineffective pre-operative, operative and post-operative care. The district court concluded that petitioners had failed to prove either that the doctors who treated the boy were negligent or, assuming that negligence was established, that it was the proximate cause of the injuries. 216 F. Supp. 1. The court of appeals affirmed. 334 F. 2d 931.

Petitioners do not challenge these findings below. Rather, they urge that certiorari be granted to review rulings of the district court during the trial. Specifically, petitioners contend (1) that either under Section 2317.52 of the Ohio Revised Code[2] or under Rule 43(b) of the Federal Rules of Civil Procedure,[3] they

[2] "When the action or proceeding relates to a transaction or occurrence in which it has been shown or it is admitted that the adverse party acted either in whole or in part through an agent or employee, such agent or employee of the adverse party may be called as a witness and examined as if under cross-examination upon any matters at issue between the parties which are shown or admitted to have been within the scope of such agent's or employee's authority or employment."

* * * * *

[3] "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

should have been permitted to call as witnesses government doctors who treated the boy and to examine them as if under cross-examination; (2) that they were entitled to an inference of negligence under the doctrine of *res ipsa loquitur;* and (3) that the government's failure to produce missing medical records (X-rays and the reports on them) entitled petitioners to a judgment in their favor or a favorable inference concerning what the records would have shown, or, alternatively, that expert witnesses for the government should not have been allowed to express an opinion based on the incomplete records available at the trial.

Of the three doctors mentioned by petitioners (Pet. 7–15) in connection with the asserted right of cross-examination under Ohio law or Rule 43(b) of the Federal Rules, two (Dr. Strenger and Dr. Kaplan) were called as witnesses by the government. Petitioners had a full opportunity to cross-examine these witnesses (see Tr., 654–691, 698–708, 714–718, 903–927)[1] and, as to them, petitioners' claim is wholly insubstantial. The third doctor (Dr. Talley) was called as a witness by petitioners early in the trial. The district court correctly ruled that the Ohio statute did not control the procedure in a federal court with respect to the scope of examination of witnesses, and that Rule 43(b) was inapplicable, since the doctor was not an "officer, director, or managing agent" of

[1] The reference "Tr." refers to the transcript of proceedings in the district court.

the government within the meaning of the rule (see P. App. 15a–16a) [5]

After a careful examination of Ohio law (see 216 F. Supp. at 2–4), the law of the place where the acts in question occurred, the district judge concluded that the doctrine of *res ipsa loquitur* was inapplicable to the facts of this case. Petitioners do not contend that this is a misinterpretation of Ohio law. Rather, citing cases from other jurisdictions, they contend that this Court should apply the doctrine as a matter of federal law. This contention is without merit. Not only was the district judge entirely correct in applying Ohio law, see Section 1346(b), *supra,* note 1; *Williams* v. *United States,* 350 U.S. 857. In addition, in a malpractice case such as this, involving a rare illness and conflicting medical opinion regarding the appropriate treatment, there is no occasion for the application of a doctrine which starts with the assumption that no injury would have occurred but for someone's negligence.

With respect to the missing medical records, petitioners' suggestion (Pet. 19) that the X-rays and reports in question were lost or concealed by government doctors is without basis in fact. The testimony

[5] The reference "P. App." refers to the appendix to petitioners' main brief in the court of appeals.

Petitioners show no ground for the examination of Dr. Talley as an "unwilling or hostile" witness pursuant to the first sentence of Rule 43(b). They point to nothing in Dr. Talley's testimony which suggests that he was a hostile witness, and at no point during his testimony did petitioners' counsel ask the court's permission to examine him as a hostile witness.

at trial was that the X-rays were sent to a private hospital where the boy was being treated after he left the government hospital and were not returned (R. App. 54b, 61b).[6] Accordingly, no presumption that the missing records contained evidence favorable to petitioners would have been proper.[7]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1964.

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[6] The reference "R. App." refers to the appendix to respondent's brief in the court of appeals.

[7] Two of the government doctors and petitioners' own medical witness indicated that the X-rays would have had little if any bearing on the question whether the boy's illness should have been correctly diagnosed sooner than it was, which was the only issue at stake so far as the X-rays were concerned (Tr. 63–64, 218–219, 920). The court of appeals stated: "* * * [I]t appears that, if, in the case, the missing records in question, consisting of X-rays and reports thereon, had been available at the trial, they would have been, in the light of testimony, devoid of probative value on the issue whether there were clear signs of peritonitis present on December 30 and 31, 1958, which was the only pertinent point involved in the controversy about the records." 334 F. 2d at 935–936.

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